

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLANDIS VIELOT	:	SMALL CLAIMS DETERMINATION DTA NO. 819974
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Years 2000, 2001 and 2002.	:	

Petitioner, Clandis Vielot, 119-27 230th Street, Cambria Heights, New York 11411, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the years 2000, 2001 and 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on March 8, 2005 at 2:45 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Mac Wyszomirski).

Since neither party reserved time to file a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUES

I. Whether petitioner has sustained his burden of proof to show that he is entitled to claim head of household filing status for the three years at issue in this proceeding.

II. Whether petitioner has adduced sufficient evidence to substantiate New York itemized deductions of \$14,442.00 as claimed on his 2002 personal income tax return.

FINDINGS OF FACT

1. Petitioner, Clandis Vielot, filed timely New York State and City resident income tax returns with the Division of Taxation (“Division”) for the years 2000, 2001 and 2002. On his 2000 and 2001 tax returns, petitioner claimed head of household filing status, one dependent exemption and a standard deduction of \$10,500.00, which is the amount allowed an individual with a head of household filing status. On his 2002 income tax return, petitioner filed as a single individual and claimed New York itemized deductions of \$14,442.00, which amount consisted of contributions of \$1,892.00 and job expenses and other miscellaneous deductions of \$12,550.00. Petitioner’s 2002 return did not claim any dependent exemptions. On all three returns petitioner’s address was listed as 1078 East 43rd Street, Brooklyn, NY 11210.

2. On or about April 23, 2003, petitioner filed an amended return for the 2002 tax year claiming he was due a refund of \$235.00 based on a change in his filing status from single to head of household and also the allowance of a deduction of \$1,000.00 for one dependent exemption for his daughter. Petitioner’s original return for 2002 had failed to claim a dependent exemption.

3. Petitioner’s spouse, Robin Branch-El-Vielot, also filed New York State and City resident income tax returns for the years 2000, 2001 and 2002. The filing status claimed by Mrs. Vielot on her returns for each of the three years in question was married filing separate return and each return claimed itemized deductions and one dependent exemption. The address shown on each of Mrs. Vielot’s return was the same as petitioner’s, i.e., 1078 East 43rd Street, Brooklyn, NY 11210.

4. Upon review of petitioner's amended return for the 2002 tax year, the Division requested that petitioner submit documentary evidence to substantiate the \$14,442.00 of New York itemized deductions as claimed on both the original and amended returns. Petitioner did not respond to the Division's request for documentary evidence.

5. In 2003, the Division issued three statements of proposed audit changes to petitioner changing his filing status from head of household to married filing separate return since "[m]arried taxpayers living at the same address, who elect to file separate returns, must each claim the filing status 'Married Filing Separate Return' on their New York returns." For the 2000 and 2001 tax years, the change in filing status reduced the allowable standard deduction from \$10,500.00 to \$6,500.00. For the 2002 tax year, the Division disallowed as unsubstantiated petitioner's claimed New York itemized deductions of \$14,442.00 and, in lieu thereof, allowed petitioner the \$6,500.00 standard deduction available to an individual with a married filing separate return filing status. The Division did allow petitioner to claim one dependent exemption for 2002 as claimed on his amended return for this year.

6. Based on the statements of proposed audit changes, the Division issued three notices of deficiency to petitioner asserting that additional New York State and City personal income tax was due, together with interest, in the following amounts:

ITEM	2000	2001	2002
NYS tax due	\$373.00	\$423.00	\$662.00
NYC tax due	164.00	149.00	300.00
Interest	76.95	60.22	35.63
Payments	-0-	-0-	494.00
Total	\$613.95	\$632.22	\$503.63

7. Petitioner timely protested the three notices of deficiency by filing requests for conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference, held on March 17, 2004, resulted in all three notices of deficiency being sustained in full. BCMS issued three consents to petitioner which, when combined, indicated that the tax and interest for all three years at issue totaled \$1,794.21 and that "[i]f payment is received after April 9, 2004, additional penalty and/or interest charges will accrue." By two checks, each dated April 5, 2004, petitioner remitted payment of \$1,796.00 and thus overpaid his liability by \$1.79. At the small claims hearing held herein, petitioner asserted that if he is unsuccessful in proving that he is entitled to claim head of household status, he is still entitled to a refund of the \$1.79 overpayment noted above. The Division did not present any evidence or argument regarding petitioner's assertion of a refund in the sum of \$1.79.

8. The 1078 East 43rd Street, Brooklyn, New York address shown on both petitioner's and his spouse's 2000, 2001 and 2002 tax returns was a two-family house owned by Margaret Vielot, petitioner's sister. Margaret Vielot occupied the first floor of the residence, while petitioner, his spouse and their two daughters occupied the second floor apartment.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner maintains that on June 30th of each year in question, he and his younger daughter, born in 1999, moved from the second floor apartment to a basement apartment located at the same address. On January 1 of the following year petitioner asserts that he and his daughter would move back to the second floor apartment. Petitioner argues that he made this move each year solely for tax purposes and that he qualifies for head of household filing status since he maintained a separate permanent residence for more than one-half of each tax year for his dependent daughter.

10. The Division maintains that petitioner has failed to submit any documentary evidence, such as a lease, rent payments and separate utility bills, to show that he maintained a separate residence in a basement apartment located at 1078 East 43rd Street, Brooklyn, New York, and that, absent any supporting documentary evidence, petitioner has failed to meet his burden of proof.

CONCLUSIONS OF LAW

A. Tax Law § 689(e) places the burden of proof on petitioner to show that the notices of deficiency issued by the Division are incorrect. In the instant matter, petitioner's position that he and his daughter spent slightly less than one-half of each tax year living in the second floor apartment with the rest of the family and then moved, for the balance of the year, to a basement apartment in the same house certainly strains reason and credibility. Without one piece of documentary evidence to support petitioner's unusual, to say the least, living arrangement, it cannot be found that he has sustained his burden of proof to show that he maintained a separate permanent residence for more than one-half of each tax year for his dependent daughter. Accordingly, petitioner is not entitled to claim head of household filing status for the three years in dispute.

B. Petitioner has also failed to submit any documentary evidence to support the \$14,442.00 of New York itemized deductions as claimed on his 2002 tax return and therefore the Division properly disallowed same as unsubstantiated.

C. In accordance with Finding of Fact "7" petitioner has overpaid the tax and interest due for the three years at issue by \$1.79. Petitioner has requested and is entitled to a refund of this amount.

D. The petition of Clandis Vielot is granted to the extent indicated in Conclusion of Law “C”, the Division is directed to refund to petitioner the sum of \$1.79 together with such interest as is allowed by law, and that, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
May 12, 2005

/s/ James Hoefer
PRESIDING OFFICER